

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

ROBERT REID, on behalf of himself and all others similarly situated,	)	Civil No. 11cv1310 L (BLM)
	)	
Plaintiff,	)	<b>ORDER GRANTING</b>
	)	<b>DEFENDANTS' EX PARTE</b>
v.	)	<b>MOTION TO FILE</b>
	)	<b>SUPPLEMENTAL AUTHORITY IN</b>
JOHNSON & JOHNSON and McNEIL	)	<b>SUPPORT OF DEFENDANTS'</b>
NUTRITIONALS, LLC,	)	<b>MOTION TO DISMISS [doc. #46]</b>
	)	
Defendants.	)	
	)	
	)	

Defendants seek to file supplemental authority in support of their motion to dismiss. (Doc. 46.) In the alternative, Defendants move to strike portions of the complaint. (*Id.*) Specifically, Defendants wish to supplement the record with: (1) a recent Ninth Circuit decision, *Carrea v. Dreyer's Grand Ice Cream, Inc.*, 2012 WL 1131526 (9th Cir. 2012) and (2) the February 21, 2012 Federal Register, 77 Fed. Reg. 9842.

The Court finds that Defendants show good cause here for supplementing the record. The Ninth Circuit's *Carrea* decision, although unpublished, directly concerns Defendants' express preemption argument in their motion to dismiss. (MTD at 10–14.)

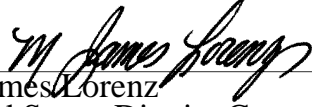
The February 21, 2012 Federal Register states that the FDA intends to extend the period of time it exercises "enforcement discretion concerning the health claim for phytosterols and risk of coronary heart disease[.]" 77 Fed. Reg. 9842 (2012). The FDA's position, as stated in the

1 Federal Register, directly concerns Defendants' argument that Plaintiff's claims are barred by  
2 the primary jurisdiction doctrine. (MTD at 15–18.) Because the Federal Register was published  
3 after the briefing closed on the motion to dismiss, Defendants are not at fault for bringing this  
4 matter to the Court's attention at this time. In addition, Defendants would be prejudiced if the  
5 Court does not consider this recent federal administrative record in its order for claims  
6 surrounding plant stanol esters. Accordingly, the Court will grant Defendants' application to file  
7 supplemental authority.

8 Based on the foregoing, the Court hereby **GRANTS** Defendants' *ex parte* application to  
9 file supplemental authority in support of Defendants' motion to dismiss with the decision from  
10 *Carrea v. Dreyer's Grand Ice Cream, Inc.*, 2012 WL 1131526 (9th Cir. 2012) and to file  
11 supplemental authority in support of Defendants' motion to dismiss with the February 21, 2012  
12 Federal Register, 77 Fed. Reg. 9842 (2012).

13 **IT IS SO ORDERED.**

14 DATED: September 17, 2012

15   
16 M. James Lorenz  
United States District Court Judge

17 COPY TO:

18 HON. BARBARA L. MAJOR  
19 UNITED STATES MAGISTRATE JUDGE

20 ALL PARTIES/COUNSEL  
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